No 5687

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. T. McDONNELL, Assignee, AMERICAN OVERSEAS WAREHOUSE COMPANY, INC.,
Appellant and Cross-Appellee,

vs

BANK OF CHINA, BANK OF COMMUNICATIONS, EXCHANGE BANK OF CHINA, CHINA & SOUTH SEA BANK, AGRICULTURAL AND INDUSTRIAL BANK OF CHINA, CHINESE AMERICAN BANK OF COMMERCE, CHUNG YUAN INDUSTRIAL BANK, NATIONAL COMMERCIAL BANK LIMITED, BANK OF AGRICULTURE & COMMERCE, BANQUE FRANCO-CHINOISE and SHIH FU SHENG,
Appellees and Cross-Appellants

PETITION FOR REHEARING FOR APPELLEES AND CROSS-APPELLANTS

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Cases Cited, and Other Authorities Referred to

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PETITION FOR REHEARING FOR APPELLEES AND CROSS-APPELLANTS

To the Honorable William B. Gilbert, Presiding Judge, and to the Honorable Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The Chinese Banks, appellees and cross-appellants herein, are grievously injured by the appellate decision of general reversal. They respectfully petition for rehearing. They represent that:

I The Supreme Court, with opinions by Chief Justice Taft and Justice Brandeis, in two cases resembling the case at bar and where the question was whether the parties had had pleading, procedure, adjudication, and appellate record and adjudication to which they were entitled in equity, reversed and remanded rather than of itself adjudicate on the merits.

II The Chinese Banks, appellees and cross-appellants, are entitled in equity at least to amend their pleadings, and with knowledge that they are proceeding in equity, to produce evidence in points where the construction of the National City Bank's documents cannot be determined from the documents themselves, and to have adjudication in the trial court.

I

The opposed interests in this action were the Chinese Banks on one part, the National City Bank of New York on the other. Both had agreed together, it is obvious, to have the assignee of the insolvent warehouse sell what flour came into his possession upon the assignment and distribute the net proceeds proportionately to the warehouse receipts both held. It turned out that the National City Bank had no warehouse receipts. The assignee, however, accepted other documents from the National City Bank in

place of the warehouse receipts, and he was prepared to distribute upon them. Then the Chinese Banks sued for the entire net proceeds. Judgment was for the Chinese Banks except with respect to a portion of flour specified in one of the documents of the National City Bank. That excepted portion caused the cross-appeal.

One fact stands out: When this action commenced, the usual functions of equity in warehouse insolvencies had already been done and cleared away; and there remained to determine only the legal effect of the substitutd documents of the National City Bank. *Neither party sought equity. The trial court in a thorough-going opinion made not the slightest reference to equity.* THE ACTION WAS FIRST ATTEMPTED TO BE CHANGED FROM LAW TO EQUITY THROUGH SKILL OF APPELLATE COUNSEL AT SAN FRANCISCO IN THEIR OPENING BRIEF FOR APPELLANT.

This outstanding fact, that equity had been unsought by either party because the benefits of equity had already been secured to each of them, we are obliged to believe will be given deserving weight in considering the present petition. And in this connection the Chinese Banks desire to free themselves entirely from the inference that of themselves or, through their attorneys they have conceded the action to be equitable in nature or object. Such inference appears to be ascribed to them in the following language of the appellate opinion:

"In this decision the court below adopted the general rule that where goods belonging to different persons are so intermingled as to be indistinguishable,

whether by consent of the owners or by wrongful act of the depositary, the owners become tenants in common of the mass, and if a part of the commingled property is lost or misappropriated by the depositary, all owners must bear the loss *pro rata.* All parties to the appeal concede the correctness of this rule as a general proposition of law." Infra, Appendix iii

Search of the record and briefs clearly disassociates the Chinese Banks and their attorneys from the proposition mentioned, and particularly from the implication that equitable distribution was thereby admitted by them to be the nature and object of the action they brought. *The foregoing language of the opinion is almost word for word that of appellant's attorneys at San Francisco.* Aplts Brief, p 9; and Reply Brief, p 3. At the place cited first appellant's attorneys, where they are opening their main argument, say:

"So far as concerned the rights of plaintiffs as holders of godown warrants, the trial court applied the general rule that where goods, either by the consent of the concerned or wrongfully by a depositary, are so intermingled as to be indistinguishable, the holders are tenants in common of the mass, and if a part of the mingled property is lost or is misappropriated by the depositary, all the owners bear the loss *pro rata.* This general proposition is not in dispute and is well settled." (No citation to the record)

Turning to the opinion of the trial court, we find, however, the court says, with reference to questions of law discussed in the briefs of counsel:

"I have not deemed it necessary to go into those questions in this opinion, for the simple reason that in their last analysis they all come down to the question as to whether the National City Bank is the holder of *evidences of title* to this flour [italics in original] which are in legal effect the equivalent of warehouse receipts. I have no difficulty in reaching the conclusion that five of the transactions, all of which are similar to the one illustrated by Ex. 1, do not as a matter of law place the bank in the position of a holder of warehouse receipts." Transcript of Record, p 40.

It will be noted also that appellant's attorneys restricted their statement, saying:

"So far as concerned the rights of plaintiffs as holders of godown warrants, the trial court applied the general rule . . ."

The appellate court, however, strikes out the restriction. The result follows that the remainder of the opinion proceeds as if there were a large number of claimants,—as if notice had been published bringing in all claimants in usual warehouse insolvency proceedings, and as if equity must have been resorted to for accounting and adjustment of a multitude of claims. That was not at all the case. *The equity features had all been disposed of by consent of the two parties.* One party had warehouse receipts, the other assignments of pledges. Were the assigned pledges legally equal to the warehouse receipts? The parties and the trial court proceeded in an action at law. The party holding assigned pledges lost. He appeals at law. It was not for him to choose the form

of action below, for he was the defendant. He proceeded without objection to the form of action the plaintiffs had chosen. But appellate counsel argue, and the appellate court decides, that the action had to be and was in equity.

On writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit in

> *Twist et al v Prairie Oil & Gas Co*, 274 US 684, 686, 689-90, 692; 71 L ed 1297, 1299, 1301-2

the Supreme Court, with opinion by Mr Justice Brandeis, reversing the decision below, said:

> The Circuit Court of Appeals "had before it for review, on appeal and cross appeal, a final decree in equity of the district court for Eastern Oklahoma. The case had been heard by the trial court on the evidence as a suit in equity; and had been treated as such in both courts by both parties. The court of appeals concluded that the trial court did not have jurisdiction in equity; ruled of its own motion, that the case must be deemed to have been tried below as one at law on an oral waiver of jury; and that, since there had been no waiver filed . . . and no bill of exceptions or special findings of fact . . . the appellate court could not consider the errors assigned by the parties. It, therefore, affirmed the judgment on the pleadings. . . .
>
> "In federal courts, as in others, a plaintiff has a right to choose whether he will seek to enforce a legal or an equitable cause of action and whether he will seek legal or equitable relief. He makes his election and proceeds at law or in equity at his peril. . . . Formerly, if a plaintiff in a federal court sued in equity and the objection that there was a plain, adequate and complete remedy at law was sustained, the bill was necessarily dismissed. . . . And ordinarily the dismissal was required to be without prejudice to an action at law . . .; though possibly such

precaution was unnecessary. Now, under the Act of March 3, 1915, chap. 90, § 274a, 38 Stat. at L. 956, U. S. C. title 28, § 397, and Equity Rules 22 and 23, if the suit was improperly brought in equity, either the trial court or the appellate court may transfer the case to the law side. . . .

"The parties cannot, of course, compel the trial court to hear in equity a suit which seeks a legal remedy for a legal cause of action. . . . Nor can the task of reviewing such a case as if it were actually an equity cause be imposed upon the appellate court through consent of the parties. . . . Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction. . . . But that objection, whether taken in the trial court or in the appellate court, does not go to the power of the court as a federal court.

. . .

"The court of appeals, being of opinion that the plaintiffs had not established a right to relief in equity, because there was a plain, adequate and complete remedy at law, might, on the undisputed facts, have reversed the decree on that ground without considering the specific errors assigned; and, rightly or wrongly, it might have ordered the bill dismissed without prejudice to the remedy at law; or might conceivably have ordered the case transferred to the law docket; or might have considered the case on the merits as an equity appeal, in the view that at such stage of the proceedings it was desirable to hold that the objection to the equity jurisdiction had been waived. . . . But it could not, while refusing to consider the errors assigned, retain the case and adjudicate the merits. This it did when it affirmed the decree. *It was error to declare that this proceeding, which is a bill in equity in its nature as well as in its form, and which seeks relief that only a court of equity can give . . ., shall be deemed an action at law, because the only remedy open to the plaintiffs was at law.* . . . (italics not in original)

. . .

"Because the Court of Appeals should have considered the errors assigned as in an equity cause but did not, we reverse its judgment and remand the case to it for further proceedings in accordance with this opinion. . . . Reversed."

We admit that the rule differs, on present authority, where an equity suit is erroneously tried at law, and that the error may then be treated as harmless if the appellate court is satisfied that the proper result was reached.

Great American Insurance Co v Johnson, 25 F 2d 847, 849 (Key Titles 7 and 8); and opinion on petition for rehearing, 27 F 2d 71 (Key Title 1); *Liberty Oil Co v Condon National Bank,* 260 U S 235, 240-5; 67 L ed 232, 235-7, opinion by Mr Chief Justice Taft

We are aware also of the holding of this Circuit Court of Appeals in

Andersen, Meyer & Co v Fur & Wool Trading Co, 14 F 2d 586, 589 (Key Titles 3-5)

where appellant had denied the sufficiency of the petition to sustain the decree or to warrant equitable relief and had asserted that the action should have been at law, and where the court said:

"But the final answer to both objections is that neither of them can be held ground for reversal here, for the court below had jurisdiction of the cause of action on one side or the other, whether at law or in equity. The statutes creating the United States Court for China make no provision for jury trials. The appellant participated in the trial without objection to the form of action or to the jurisdiction. The trial would have been had in no different manner had it

been regarded a law action, and the amount recoverable under the pleadings, the stipulation, and the evidence would have been the same in either form of action."

What makes strong distinction in favor of the Chinese Banks in the present case is that fatal deficiency of appellant's record on appeal brought before this Circuit Court of Appeals:

> *Only the complaint and its attached exhibits,*
> *the answer,*
> *the reply,*
> *the judgment for plaintiffs* (which cannot include comments on evidence and on the law).

So far as could benefit appellant this record was dead at its birth. The pleadings alone could not have matured into a judgment in the trial court. How could they on appeal?

> *O'Brien, Manual of Federal Appellate Procedure,* ed 1929, 51-9, and particularly 57-8

How could this Circuit Court of Appeals, in the light of above cases, its own and those of the Supreme Court, as Mr Justice Brandeis said:

> "while refusing to consider the errors assigned (in the present case no attempted assignment of errors having been relied upon), retain the case and *adjudicate the merits*"?

. . .

That "equality is equity" in equitable distribution of assets is the single and solitary maxim of equity in-

voked by appellant and adopted by the appellate court.

Of other maxims it would seem at least two might here apply: "He who comes into equity must come with clean hands"; "Equity aids the vigilant, not those who slumber on their rights". For reason to apply the "clean hands" maxim we would refer to the discerning analysis of the situation which is contained in the dissenting opinion; and it might additionally be observed, as was done in the oral argument for appellees, that the one document put into evidence for defendant, and with which the others are said to be of like legal standing, all six being described as assigned pledges, bears upon its face the unmistakable marks of invalidity and we, reluctantly think, of fraud. And as to the maxim "equity aids the vigilant", the dissenting opinion, as well as the prevailing opinion, observes that the really interested party, the National City Bank, has not openly or actively come into or been brought into this action. Can the answer, as a pleading, be said to be "vigilant"?

The equity maxim that is exclusively used,—"equality is equity",—we think is too broadly, and it certainly is one-sidedly used. If the Latin is the original maxim, as it probably is, the translation by Judge Story is wrong. No learning need be assumed for anyone to say that of course the translation should be: "Equity is of the nature of equality". And it is unreasonable to say that "equality is equity" for that means that equity has no other element than equality. "I need hardly repeat", said Lord Esher, Master of Rolls, in

Yarmouth v France, 19 QBD 647, 653,
"that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general in their language that they always include something which really is not intended to be included in them."

Or if we take "equality is equity" for the broad value it generally connotes, how can it apply here? Let us quote all that is said of it in the text of Corpus Juris under the title of Equity:

> "[§207] M. Equality Is Equity. The maxim that equality is equity expresses an ancient equitable principle of wide and general application. The meaning of this maxim is that in the absence of relations or conditions requiring a different result, equity will treat all members of a class as upon an equal footing, and will distribute benefits or impose burdens and charges either equally or in proportion to the several interests, and without preferences. The maxim is restricted in its application to situations or conditions where the parties are on the same footing. It is also restricted by the maxim that equity follows the law; and by the maxim that where equities are equal the first in order of time must prevail. But the presumption is in favor of equality of rights; a right to a preference must be proved. The rule that those who share in benefits must contribute proportionately to the expenses is an application of this maxim." *21 CJ 206*

To apply here the maxim must pass the two restrictions mentioned:

1 *The parties must have been found on the same footing;*
2 *Equity follows the law.*

The trial court, directly in contact with the evidence and in a thorough-going examination of the evidence and reasoning of the law, said:

> "I have no difficulty in reaching the conclusion that five of the transactions, all of which are similar to the one illustrated by Ex. 1, do not as a matter of law place the bank in the position of a holder of warehouse receipts." *Transcript of Record,* p 40

For the second restriction, equity follows the law, we limit the argument to a judgment of this Circuit Court of Appeals which has proved the most fundamental of all judgments relating to United States jurisdiction in China,

United States v Biddle, 156 F 759.

This judgment is foundation for applying in China to American defendants the Acts of Congress of general nature enacted for jurisdictions as to which Congress has exclusive jurisdiction and which, as required by Acts of Congress,

Revised Statutes, Sec 4086; 22 *USCA* 145

are suitable to be applied and necessary for giving the treaties effect. It can be shown, for example, that incorporation statutes for the Territory of Alaska and for the District of Columbia are of doubtful application and questionable necessity; and the attempt to apply them was early abandoned. A warehouse regulating statute enacted for the District of Columbia would be, for like reason, probably inapplicable. The Uniform Warehouse Receipts Act, on the other hand, would probably be, at least in important parts, applicable, the reasoning in *United States v Biddle* leading to that conclusion. The warehouse business in the

United States is mainly authorized and controlled by the several States of the Union, and their statutes, except as to the Uniform Warehouse Receipts legislation, differ in marked respects. The particular warehouse at Tientsin that defaulted in this case was supposed to be a State of Delaware corporation. The State of Delaware of course could effect no control whatsoever of the ordinary course of business of that warehouse. Was the law applicable to its astounding defaults merely the common law? Was it a law conglomerate of State laws? Has counsel for appellant anywhere relied upon the now elaborately developed State laws of warehousing? No, counsel has relied upon cases most of which the jurisprudence relating to warehousing has passed far beyond. The straight, thorough reasoning of the trial court in the part of its opinion relating to pledge of specific goods, counsel diverts attention from by pointing to generalities about equity. If equity follows the law, that is accepts as controlling it the Act of Congress in the Uniform Warehouse Receipts Act establishing the requisite form and contents of warehouse receipts, could the supposed pledges rank equally with the admittedly valid receipts? They could not under *United States v Biddle* as decided by this Circuit Court of Appeals.

II

Federal equity procedure is no less integral than that at law. It is a special procedure adapted from

the main line of procedure at law. Its requirements are not diminished but rather increased over those of the law. If federal courts have authority to conform in law actions (though not for record on appeal) to procedure established by local State courts, they have no such authority in equity procedure. The United States Constitution maintains equity distinct from law, and the Supreme Court of the United States establishes Equity Rules for all courts of the United States having equity jurisdiction. The United States Court for China has equity jurisdiction, and with the provision of the statute for review "in all cases" from the Court for China, and the provision of the statute for further review in the Supreme Court, there exists a unity and harmony of procedure in equity even stronger and more dominant than at law.

Constitution, Art III, § 2, Subdiv 1;
China Press v Webb, 7 F 2d 581, 583

We are most unwillingly constrained to believe, and the plain result must be, that *if the present decision on appeal in*

McDonnell v Bank of China

stands, *any equity matter coming to this Circuit Court of Appeals from China will loosen and slip in procedure and record to hopeless extent.* What procedure and record from China has less merited the patience of this appellate court? What character can equity appeal from China hereafter have? What benefits from the present decision will equity trials in China show? What standing will equity maintain as compared with law?

Toey et al v Suffert, 167 F 125

In this connection we have very attentively read the opinion of Mr Chief Justice Taft in

Liberty Oil Company v Condon National Bank,
260 US 235, 240-5; 67 L ed 232, 235-7

The opinion in its entirety bears upon our case so closely that we should quote it *in extenso* but for *the desire we have that it be read directly from the reports.* It will be observed the action began as an action at law for money had and received. The defendant bank claimed to be only a stakeholder and asked that other claimants of the fund be made parties and prayed for affirmative equitable relief in the nature of a bill for interpleader. Under Equity Rule 22 a suit in equity which should have been brought at law must be transferred to the law side of the court; but no corresponding rule or statute expressly directs that a law action which should have been brought on the equity side be transferred thereto, although *the Supreme Court here expresses the view that power so to transfer is implied in the broad language of Section 274b of the Judicial Code.* The interpleader in equity made the case one of equity, and *it should have been treated as in equity both on trial and on appeal.* We now quote at 260 US 244:

> "It was, therefore, error by the circuit court of appeals to proceed as if it were reviewing a judgment in a suit at law upon a bill of exceptions. It is true the record contained a bill of exceptions, but there was also a transcript of the same evidence, certified as required in appeals in equity."

Referring to Judicial Code §§ 269 and 274b, the Supreme Court noted that the appellate court is given

full power to render such judgment upon the record as law and justice shall require.

> "On this review by certiorari, we could consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. [271 F 928] On such an issue alone, however, we could not have granted the writ, because, except for the important question of practice, the case was not of sufficient public interest to justify it. We think it better, therefore, to reverse the judgment of the Circuit Court of Appeals, and to remand the case to that court for consideration and decision of the issues of fact and law in this case as on an appeal in equity."

The Equity Rules had been complied with in preparing the case for review. THEY HAD NOT BEEN COMPLIED WITH IN THE CASE FROM CHINA.

> "The plaintiff below was evidently not certain of the proper practice, and *prepared for either writ of error or appeal.*" (The report as cited, page 245, top)

In the case from China the appellant, it is plain, made his answer, carried on in the trial, and, having judgment against himself, brought the case for review without regard for the requisites whether in equity or at law. In contrast, the appellees were diligent in preparing their case for trial and regardful of observing the requirements of procedure leading to review. Yet, taken by surprise in the appellate court, with the contention that the case had actually been in equity, they stand, under the appellate court's decision as if their complaint below had been outright dismissed without right to plead or to present for trial an issue in equity.

The Chinese Banks, appellees and cross-appellants herein, for the reason that they are entitled in equity to have benefit of proceedings in equity, respectfully and earnestly petition for remand, with instructions, to the trial court.

Dated, San Francisco,
August 14, 1929

Respectfully submitted,
P. H. B. KENT
FRANK E. HINCKLEY
Attorneys for Appellees and Cross-Appellants

Certificate of Counsel

The undersigned, who is of attorneys for petitioners herein, hereby certifies that in his judgment the foregoing petition for rehearing is well founded, and he further certifies that said petition is not interposed for delay.

Dated, San Francisco,
August 14, 1929

FRANK E. HINCKLEY
Of Attorneys for Petitioners

Appendix.

without marks, except the brands on the bags, and without anything to indicate that any portion of the flour belonged to any particular person. He further discovered that against this quantity of flour there were outstanding warehouse and other receipts calling for the delivery of upwards of 1,000,000 bags. Of this quantity the plaintiffs in the court below held godown warrants, or warehouse receipts, for 996,500, and the National City Bank of New York a godown warrant and other receipts for 161,000. By consent of all parties in interest, the assignee sold the flour on hand for approximately $300,000 in Tientsin currency. He then formulated a plan for the ratable distribution of the proceeds of the sale among all receipt holders in proportion to the number of bags of the various brands of flour called for by their respective receipts. Under this plan of distribution there was allotted to the National City Bank the sum of about $53,000 and the balance, less expenses, was allotted to the plaintiffs. The plaintiffs not being satisfied with the allotment made to the National City Bank brought the present suit in the court below against the assignee to recover the entire proceeds of the sale. The defense interposed by the assignee was a partial one only, setting up the claim of the New York City Bank to the sum of approximately $53,000, allotted to it under the proposed plan of distribution. The court below reduced the allotment to the New York City Bank to the sum of approximately $6,600, subject to a further deduction of approximately $3,300 in the event that no flour of a particular brand came into the possession of the defendant as assignee. A judgment or decree

was thereupon entered awarding to the plaintiffs the entire proceeds of the sale less the amount awarded to the New York City Bank and less the expenses of the assignee. From this judgment or decree both parties have appealed.

In this decision the court below adopted the general rule that where goods belonging to different persons are so intermingled as to be indistinguishable, whether by consent of the owners or by wrongful act of the depositary, the owners become tenants in common of the mass, and if a part of the commingled property is lost or misappropriated by the depositary, all owners must bear the loss *pro rata*. All parties to the appeal concede the correctness of this rule as a general proposition of law.

Before taking up the merits, we must dispose of a contention made by the appellees and cross-appellants to the effect that this court cannot consider the sufficiency of the evidence to support the findings or judgment under its decisions in China Press v. Webb, 7 F. (2d) 581, Wulfsohn v. Russo-Asiatic Bank, 11 F. (2d) 715, and Gillespie v. Hongkong Banking Corp., 23 F. (2d) 670. The contention is well taken if this was an action at law; but the proceeding was equitable in its nature and objects. It was a proceeding against a trustee or assignee for the equitable distribution of a fund in his hands, and it is well settled that such a proceeding is properly instituted in a court of equity. As said by the court in Dows v. Ekstrone, 3 F. 19:

> "When a warehouseman, having in store a quantity of wheat deposited by several persons, for which, under the statute, he issues receipts to

> each depositor, fraudently disposes of part of the wheat, the receipt holders must share in what remains according to the equitable interest of each, to be ascertained by an accounting. No one of such receipt holders can recover at law the whole, nor could any number of such holders, less than the whole number, recover possession as against the remainder. This case must be brought in a court of equity, where all the claimants can be heard and decree can be rendered establishing the rights of each with respect to the property in controversy."

And to such a proceeding it would seem that the New York City Bank was an indispensable party; but that objection was not urged in the court below, nor is it particularly urged in this court. National City Bank v. Harbin Electric Joint-Stock Co., 28 F. (2d) 468.

We come now to a consideration of the merits. The only claim in controversy is the claim of the New York City Bank, and that claim is based on six separate and distinct transactions, all of which are similar in form, except one which was later accompanied by a warehouse receipt, and is for that reason more favorable to the appellant than the remaining five. We will refer to one of the transactions as illustrative of the others. April 5, 1927 the Union Trading Corporation executed its promissory note payable to the order of the Warehouse Company for the sum of $80,000, Tientsin currency, with interest at the rate of ten per cent per annum, and deposited with the Warehouse Company as collateral security for the payment of the loan 40,000 bags of flour of two different brands and 60 bales of gunny bags containing

400 bags each. This note was apparently discounted by the National City Bank of New York and the Warehouse Company gave the bank the following receipt: "We have received the goods mentioned in this instrument and we will hold them to the order of the National City Bank of New York, and we hereby transfer all our rights under this instrument to the National City Bank of New York." The court below held that these instruments conferred no rights on the appellant as against the holders of warehouse receipts, unless the appellant was able to identify the flour that came into the possession of the assignee as the identical flour delivered in pledge. This, of course, the appellant, like other claimants, was unable to do. The correctness of this ruling is the question for decision here. The first question is, was there a valid pledge in the first instance. Two things are essential to constitute a pledge. First, possession by the pledgee, and, second, that the property pledged be under the power and control of the creditor. Casey v. Cavaroc, 96 U. S. 477. The transaction between the Union Trading Corporation and the Warehouse Company satisfied these requirements. Whether the property pledged could be identified or was part of a general mass at the time the pledge was made, is not disclosed by the record, nor do we deem that fact material so long as the pledgee had possession of the whole. Weld v. Cutler, 2 Gray 195; Hibbard v. Merchants' Bank of Detroit, 11 N. W. 834.

In the latter case Judge Cooley said:

> "Undisputed authorities bring the legal controversy within very narrow compass, and render

general discussion needless. We have already said that it is conceded a warehouseman may transfer title to property in his warehouse by the delivery of the customary warehouse receipt. In such cases there is no constructive delivery of the property whereby to perfect the sale except such as is implied from the delivery of the receipt; and when the property represented is only part of a large mass as was the case here, there could not well be any other constructive delivery. But for the convenient transaction of the commerce of the country, it has been found necessary to recognize and sanction this method of transfer, and vast quantities of grain are daily sold by means of such receipts. . . . We are then to see whether a constructive transfer of possession that is recognized in the case of sale shall be held inoperative in case of an attempted pledge.

"If a distinction is made in the cases it ought to be upon some ground that would seem reasonable in commercial circles, where men may naturally be expected to be familiar with the ordinary methods of doing business but not with technical rules for the government of special cases. For business purposes rules should as far as possible be general, for the very satisfactory reason that special exceptions not made upon obvious reasons are not likely to be understood or observed. And the special exception supposed to exist in this case would be peculiarly liable to mislead if it were recognized. If a merchant may buy grain in store and receive a transfer of title in a warehouse receipt, he should be very likely if he had occasion to receive grain in pledge, to suppose a similar receipt to be sufficient for that purpose. No reason would occur to him why it should be otherwise, and this because there would in fact be no reason except one purely technical depending on nice legal distinctions. When that is found to be the case any proposition to establish a distinction should be rejected, decisively and without hesitation; for the laws of trade are made and

> exist for the protection and convenience of trade, and they should not tolerate rules which have the effect to border the chambers of commerce with legal pitfalls."

As long as the Warehouse Company held the note of the Trading Corporation, it will be conceded that it could assert no right as pledgee in any of the flour in storage as against the holders of warehouse receipts where there was not sufficient flour in storage to meet the demands of all. 27 R. C. L. 979. But when the Warehouse Company attorned or transferred its right in the pledged property to the appellant, a different situation arose. For while prior to the transfer the Warehouse Company held the pledged property in its own right, after the transfer it held it as agent or bailee for the transferee. It may be conceded that the relations existing between the Warehouse Company and the holders of outstanding warehouse receipts was somewhat different from the relation existing between the Warehouse Company and the appellant, but in the absence of some statute giving a priority of right to the holders of warehouse receipts, we are of opinion that the several claimants stand on an equal footing in a court of equity.

> "Thus in equity it is a general rule that equitable assets shall be distributed equally and pari passu among all the creditors without any reference to the priority or dignity of the debts; for courts of equity regard all debts in conscience as equal jure naturali and equally entitled to be paid; and here they follow their own favorite maxim that equality is equity: 'Aequitas est quasi aequalitas.' And if the fund falls short, all the creditors are required to abate in proportion."
> 2 Story's Eq. Jur., 14 ed., sec. 754.

See also Eggers v. Hayes, 41 N. W. 970; Union Trust Co. v. Wilson, 198 U. S. 530. The decree must therefore be reversed.

Inasmuch as the court below left undetermined the question whether any flour of a certain brand came into the possession of the assignee, a final decree cannot be entered here. That question should be determined, however, in advance of any final decree. The case will therefore be remanded to the court below for further proceedings not inconsistent with this opinion.

DIETRICH, C. J. dissenting:—

I am unable to take the view that there should be a reversal upon the assignee's appeal. He, of course, has no real interest and can be recognized only as representing the National City Bank. For some reason, not disclosed, that institution has not seen fit to appear, by intervention or otherwise, and thus become bound by any judgment that may ultimately be entered. Admittedly it holds no formal godown warrants or warehouse receipts. I agree that mere form is not controlling and that, with informal documents resting upon the fact of actual warehousing, it should be given a footing with the holders of formal receipts. But under commercial usage and the law a formal warehouse receipt, like more common negotiable instruments, carries certain presumptions, and its production establishes for the holder a prima facie case. Such presumptions I do not think attend the docu-

ments here produced on behalf of the National City Bank. Ordinarily a warehouse receipt imports an obligation of the warehouse company, and thus being against interest, it may be presumed to have been issued only for goods actually received. Here there was no such safeguard. The certificate or document relied upon as a warehouse receipt was issued by the Warehouse Company, in the furtherance of its own interests. It wanted the bank's money and could get it only by executing such a paper. In the ordinary case of warehousing, the warehouse company would have no incentive to falsify the facts by issuing a receipt for goods it did not actually receive; here by issuing a false receipt it would be able to get the bank's money. Though without a formal receipt the bank here offered no evidence that the actual facts were such as to justify the issuance of such a document. Not only did the assignee, who, having possession of the records of the Warehouse Company, presumably was in a better position than any other party to the suit to make proof, fail to offer any evidence, but he resisted the efforts of appellee, affirmatively to show that the Company had never received the flour. No explanation is offered of the circumstances surrounding the transaction with the bank, and no evidence even of its date. While in the briefs it is argued that the bank should be protected as a holder in good faith, it did not see fit to disclose to the court the facts from which it would appear to be such a holder. In the opinion of the majority it is said: "As long as the Warehouse Company held the note of the Trading Corporation, it will be conceded that it could assert

no right as pledgee in any of the flour in storage as against the holders of warehouse receipts where there was not sufficient flour in storage to meet the demands of all. 27 R. C. L. 979. But when the Warehouse Company attorned or transferred its right in the pledged property to the appellant, a different situation arose." But there is no evidence other than the self-serving certificate that the Warehouse Company had on hand any of the supposed flour when it dealt with the bank. And if, as stated in the majority opinion, it could assert no right against other holders of warehouse receipts, if at the time it dealt with the bank "there was not sufficient flour in storage to meet the demands of all", how could it transfer to the bank a right it did not possess? We know only that on August 1st, 1927, there were in the warehouse 91,666 bags of flour, against which there were outstanding regular receipts for 996,500 bags. Are we to presume that a short time prior to that date, when the Warehouse Company gave to the bank the certificate or acknowledgment (the precise date of which is not shown) it had in its possession more than a million additional bags?

I think the decree should be affirmed, with the exception only that as suggested in the last paragraph of the majority opinion, the court below should be directed to make a finding on the undetermined question there referred to.

(Endorsed): Opinion and dissenting opinion, filed July 15, 1929

Signed: PAUL P. O'BRIEN, Clerk